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Supreme Court of the United States

OCTOBER TERM, 1950

No. 609

EDWARD N. CLAUGHTON,

Petitioner,

—against—

STELLA GRATZ, suing as a stockholder in the name and in behalf of MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Respondents.

BRIEF OF RESPONDENT, STELLA GRATZ.

MILTON POLLACK,
Counsel for Respondent, Stella Gratz.

MILTON POLLACK,
RICHARD F. WOLFSON,
Of Counsel.

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Respondents.

BRIEF OF RESPONDENT, STELLA GRATZ.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit (Judges L. Hand, with Swan and A. N. Hand) appears at R. 82-89 and is reported in 187 F. 2d 46.

None of the District Court opinions has been reported. The opinions in the District Court consist of (a) the opinion of Judge Rifkind denying the petitioner's motion to dismiss the suit which appears at R. 23-24; (b) the memorandum opinion of Judge Rifkind granting summary judgment, except as to the quantum of damages, which appears at R. 27-28; (c) the Report, Findings of Fact and Conclusions of Law of the Master, to whom the issue of damages was referred which appears at R. 42-59; and (d) the memorandum opinion of Judge Bondy confirming the Report of the Master which appears at R. 60.

Statutes Involved.

The pertinent statutory provisions are set forth in the Appendix, *infra*, pages 18-19.

Jurisdiction.

The jurisdiction of this Court is invoked by the petitioner under 28 U. S. C. § 1254(1).

Summary Statement of the Matter Involved.

The questions of law presented by the record are of limited application for the administration of the statutes involved. The facts are peculiar to the petitioner and are not of general incidence. There are here a unique instance of protracted speculation by an "insider" in the securities of his company, a unique effort to conceal the speculations so as to obtain the benefit of the short statute of limitation, a unique flaunting of statutory duty to report such trading to the Securities and Exchange Commission, a unique use of dilatory tactics to avoid the just obligation to account pursuant to Congressional mandate, and a unique argument that venue of such an action should not be where the national exchange is located on which the speculations were conducted and cleared.

Plaintiff-respondent is a stockholder of Missouri-Kansas-Texas Railroad Company (hereafter referred to as MKT). She sued to recover on behalf of MKT from defendant-petitioner Claughton the profits which he made in short swing trading in MKT stocks. Such profits are recoverable by a corporation under Section 16(b) of the Securities Exchange Act of 1934.

MKT was originally named as a nominal defendant on whose behalf the suit was instituted, but upon its request and upon consent of all parties it was permitted by order of the District Court to become a co-party plaintiff (R. 42-43).

The purchases and sales creating the liability were effected on the New York Stock Exchange. MKT is a Missouri corporation with its head office in St. Louis. It was licensed by New York to do business and maintained an office in the Southern District of New York during the times involved (R. 4, 1). Claughton is a resident of Miami, Florida.

The undisputed facts are that Claughton "a heavy stock market trader for years, experienced in stock market transactions" was the beneficial owner of more than 10% of the common stock of MKT from December 18, 1944 to December 3, 1947 (R. 52-53). Though not a director himself, he and his group caused the election of two directors of the Railroad (R. 53). It appears that Claughton was engaged in a persistent manipulation of MKT securities on the New York Stock Exchange market, lasting nearly three years—churning the stock in volume and daily transactions—buying and selling; and selling and buying. He made 306 purchases of MKT common and 210 sales of MKT common, which totaled together 137,300 shares of stock. He made 27 purchases of MKT preferred stock and 26 sales of MKT preferred stock, totaling together 7,000 shares of stock.

The orders for these transactions were placed with New York Stock Exchange brokerage houses. The transactions were executed on the New York Stock Exchange. Deliveries and transfers of the securities involved were made in New York. All securities were retained in brokers' custody in New York for Claughton's account. The book records of the transactions and the financing of the transactions through margin loans were made and maintained in New York (R. 23, 66, 67).[1]

The law requires monthly reports from 10% stockholders as well as from directors of such changes in ownership as occurred here—so-called "Form 4" reports. Claughton ignored this requirement and his transactions remained concealed for over a year (R. 5, 6). The answer admitted this delinquency (R. 12).

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[1] See also S. M. 178-180, 183. References to "S. M." are to minutes designated as part of the record but not printed. By order of the Court of Appeals, the unprinted record has been transmitted to this Court.

Following plaintiff's demand for an accounting to MKT, Claughton transmitted his check for $366,000 to MKT with the obvious purpose of heading off a suit by the plaintiff as a stockholder against Claughton. The suit was filed nevertheless and, surprisingly, it was revealed in the course of the proceedings that this check was never paid (R. 8, 14). Following this disclosure, Claughton transmitted to MKT his own auditor's calculation of the recoverable "profit" due to MKT and transmitted therewith cashier's checks for $98,742.74 to MKT. These cashier's checks were paid and the proceeds were deposited in court to the credit of this action (R. 45, 46). Following a number of procedural motions by Claughton, the plaintiffs moved for summary judgment on the basis of Claughton's concessions and admissions except as to the quantum of damages, and requested the Court for an assessment of damages. Judge Rifkind granted summary judgment on the defendant's concession in open court that no issue remained to be tried except as to the amount of damages (R. 27). That issue was referred to a Special Master, Alexander Pfeiffer, Esq., to hear and report.

The Master held lengthy hearings both in New York and, at Claughton's request, in Miami (S.M. p. 58A). Claughton personally appeared in New York and there gave his testimony (R. 46-47). It developed that the requested Florida hearing was utilized to place on record information brought there from New York by a witness who went there from New York. This witness was Claughton's New York accountant who gave testimony consisting largely of schedules prepared from New York broker's records. These schedules were verified by Claughton's personal supporting records.

Actual determination of the damages by the Master was delayed inordinately by offers of compromise which Claughton successively proposed, withdrew, reinstated but never perfected (R. 46-50). Finally the Master refused to brook further postponement and Claughton abandoned his settlement offer. In the course of these proceedings, he conceded that under the rule of *Smolowe* v. *Delendo Corp.*, 136 F. 2d

231 (2nd Cir., 1943), cert. denied 320 U. S. 751 (1943), his profits which enured to and were recoverable by MKT amounted to $308,417.50 (R. 38-40, 60).

The Master reported to the District Court in his opinion that the *Smolowe* case should be adhered to and recommended that judgment for MKT be entered accordingly (R. 56). The recommendation was accepted, and Judge Bondy entered judgment in the sum of $308,417.50 in November 1949 (R. 61-63). Also, upon recommendation of the Master, the defendant was taxed with costs of that portion of the reference resulting "solely from defendant's dilatory tactics" (R. 61, 50).

The appeal was taken in December 1949, but was not perfected by filing of the record until a year later.

The Court of Appeals for the Second Circuit unanimously affirmed the judgment. The opinion of Judge Learned Hand dealt in great detail with all of the petitioner's arguments.

Questions Presented.

1. Whether the Court of Appeals for the Second Circuit adopted a correct rule of damages?

2. Whether Sections 16(b) and 27 of the Securities Exchange Act are constitutional?

3. Whether the venue was prejudicial and incorrect?

REASONS FOR DENYING THE WRIT.

POINT I.

THE COURT OF APPEALS HAS ADOPTED A CORRECT RULE OF DAMAGES.

It has been stipulated that under the rule adopted by the Second Circuit, a computation of profits yields the amount awarded by the judgment—$308,417.50 (R. 38, 39, 41). The petitioner contends that the rule of the Second Circuit is erroneous.

Twice, each time upon independent consideration and each time with a different court sitting,[2] the Court of Appeals has held that the method of computing damages adopted in this case is proper. That method is "lowest price in, highest price out" within a six months period, i.e., damages are the difference between the lowest price paid and the highest price for which a like amount of securities was sold within six months. In *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231 (2nd Cir., 1943), cert. denied 320 U. S. 751 (1943), the issue of how to compute damages was considered and decided. The standard adopted was designed to be thorough-going, "to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director or stockholder and the faithful performance of his duty" (at p. 239). In the case at bar, the Court of Appeals stated: "Therefore, not only will we follow *Smolowe* v. *Delendo Corporation,* * * * as a precedent; but as *res integra* and after independent analysis we reassert its doctrine" (R. 89).

No conflict of decision exists as to this administration of the statute. Indeed, divergency of opinion could scarcely exist in view of the strong considerations which militate against the adoption of any other rule.

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[2] Judge Swan was a member of the court which decided *Smolowe* v. *Delendo Corp.*, *supra*, and a member of the court which decided this action. The other judges who sat on the two cases were L. Hand, A. N. Hand, Chase and Clark.

It is not clear from the petition for certiorari precisely what other rule of damages the petitioner favors. He suggests several, each of which is either inconsistent with the terms of the statute or would destroy its effectiveness or both. The suggestions of the petitioner may be considered in turn.

1. A Three Month Rule

Section 16(b) of the Securities Exchange Act takes from an "insider" his profit from making short-swing trades in the equity securities of his corporation. This profit inures to and is recoverable by his corporation. The statute prescribes a six months period, which serves as a radius. "Any profit" realized by the insider, upon a purchase and sale or a sale and a purchase, both of which occur within a six months radius, is confiscated and inures to the corporation.

The petitioner seeks to limit the express six months radius of the statute to a three months period. He contends that the purchase and sale or the sale and the purchase which are matched in the calculation, may be those only which occur within three months of one another.

With characteristic clarity, Judge Hand stated the rule of the statute as follows:

> "This results in looking for six months both before and after any sale, and not for three months only, as the defendant insists. If one is seeking an equation of purchase and sale, one may take any sale as the minuend and look back for six months for a purchase at less price to match against it. On the other hand, if one is looking for an equation of sale and purchase, one may take the same sale and look forward for six months for any purchase at a lower price." (R. 88-89)

The petitioner suggests no reason, except the supposed exigencies of the case, why the words "six months" should be judicially read as "three months".

2. An Income Tax Rule

The petitioner also suggests, in lieu of the present rule of damages, a computation of damages based upon identification of certificates of securities bought and sold. There was no proof on the record by the defendant to so identify the securities. Plaintiffs offered proof of the profits on the rule of the Second Circuit. It was incumbent on defendant to present and sustain by proofs any alternative theory which he conceived might cut down the amount of liability. It is self evident that Section 16(b) of the Securities Exchange Act of 1934 is not a revenue act aimed at ascertaining income of individuals. It is a remedial statute designed to keep insiders out of the speculative market for the shares of stock of their own company. The protection of the public interest and the interests of investors against actions by fiduciaries which are inconsistent with the positions of trust which they have assumed demands the surrender of all possible profit. Thus the income tax rule has no relevance.

Another complete answer to the suggestion was contained in Judge Clark's opinion in the *Smolowe* case:

> "Under the basic rule of identifying the stock certificate the large stockholder * * * could speculate in long sales with impunity merely by reason of having a reserve of stock and upon carefully choosing his stock certificates for delivery upon his sales from this reserve. Moreover, his profits from any sale followed by a purchase would be practically untouchable, for the principle of identity admits of no gain without laboring proof of a subjective intent—always a nebulous issue—to effectuate the connected phases of this type of transaction. In consequence the statute would be substantially emasculated." 136 F. 2d 231, 238.

Judge Hand reiterated this reasoning in his opinion below (R. 87). It is clear that the evils sought to be eradicated by the statute would be allowed to flourish under the rule proposed by defendant.

3. A "First-In, First-Out" Rule

The petitioner says that if, as is true at bar, there is no showing of what certificates were traded, the principle of "first-in, first-out" should be adopted.

Again, the Court of Appeals has given the whole answer:

> "Once the principle of identity is rejected, its corollary, the first-in, first-out rule, is left at loose ends. At best it is a rule of convenience designed originally to hit marginal trading without shares in hand and supplementing the principle of identity. Its rationalization is the same as that for the identification rule, for which it operates as a presumptive principle; and it has no other support. If we reject one, we reject the other and for like reasons. Its application would render the large stockholder with a backlog of stock not immediately devoted to trading immune from the Act. Further, we should note that it does not fit the broad statutory language; a purchase followed immediately by a sale, albeit a transaction within the exact statutory language, would often be held immune from the statutory penalty because the purchase would be deemed by arbitrary rule to have been made at an earlier date; while a sale followed by purchase would never even be within the terms of the rule."
>
> *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 238.

4. A "Net Profit" Rule

The petitioner suggests that a "net profit" rule be applied, claiming he suffered an "economic loss." This claim of an economic loss is predicated on an illusory accounting computation by petitioner which has never been accepted by the respondents. When the petitioner says "it was not disputed" that Claughton had an overall loss from his trading he ignores the plain and repeated statements of respondents to the contrary. On an overall out-and-out profit and loss basis, the petitioner realized an economic gain during the three-year period of the speculations since every sale was at a price above the value of his holdings at the time these amounted to the statutory 10% of MKT. On December 18,

1944 the market price was 4½; no sale was under 6 and some ranged above 16 (R. 71-81).

But even if an economic loss could be spelled out from the record, the statute does not permit the "insider" to match losses against profits. To permit such matching would, like the other rules suggested by petitioner, put a premium on active trading and allow easy evasion of the statute by selling from an inventory of securities previously acquired. 136 F. 2d at 239; R. 88. "The statute does not allow the fiduciary to minimize his profits, any more than to set off his losses against them" (R. 87).

In sum, each of the arguments made by the petitioner has been twice considered and twice rejected by the Court of Appeals for the Second Circuit. The legislative history cited by petitioner was carefully analyzed in the *Smolowe* case. No reason appears for this Court to re-examine the administration of the statute by the Court below.

POINT II.

SECTION 16(b) AND SECTION 27 ARE CONSTITUTIONAL.

1. The constitutionality of Section 16(b) has now been upheld for the third time, on each occasion after independent analysis, by the Court of Appeals. *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 239-41 (2nd Cir., 1943), cert. denied 320 U. S. 751 (1943); *Park & Tilford* v. *Schulte*, 160 F. 2d 984, 988 (2nd Cir., 1947), cert. denied 332 U. S. 761 (1947); R. 84-86. Nothing need be added to these analyses, wherein every ground advanced by the petitioner was rejected.

2. The attack on the constitutionality of Section 27, which permits nationwide service and which lays venue, *inter alia*, in the district wherein an act or transaction constituting a violation of the Act occurred, is frivolous.

a. This Court has held that Congress can "provide for service anywhere in the United States." *Mississippi Publishing Co.* v. *Murphree*, 326 U. S. 438, 442 (1946). Accord: *Toland* v. *Sprague*, 12 Pet. 300, 328 (U. S. 1838); *United States* v. *Union Pacific R. Co.*, 98 U. S. 569, 604 (1879); *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 622 (1925).

b. To say that Congress cannot provide that a civil action may be tried in the venue where the wrong occurred is to ignore the fact that the Constitution itself provides that a prosecution for a crime—to say nothing of a civil wrong—*must* be prosecuted where the crime was "committed". U. S. Const., Art. III, Sec. 2, cl. 3; U. S. Const. Amend. VI.

POINT III.

THE RESULT WOULD BE THE SAME IN ANY DISTRICT.

The petitioner-defendant's venue attack at this stage is the merest formalism. Petitioner says that "The alleged profits were payable to the corporation, if at all, in St. Louis, the location of the corporation's principal place of business, or in Miami, Florida, where defendant resided, but not in New York" (Pet.'s Br. 25). He does not deny, nor can he, that the result would have been the same if the case had been filed elsewhere. The only issues are purely legal. Every basic fact has either been stipulated, conceded or admitted. Summary judgment was concededly due to the plaintiff on the defendant's concession that the only litigable issue was that of damages. He does not claim, nor can he, that he was inconvenienced by the place of trial of the issue of damages. These are, in final analysis, only accounting computations from admitted transactions.

Claughton's claim of a wrong venue is nothing more than a request for a transfer elsewhere to do the arithmetic of

damages. 28 U. S. C. § 1406(a).[3] A dismissal for improper venue would be totally inappropriate and might be utilized to advance the short statute of limitation which the defendant's concealing and delaying strategy has thus far been unavailing to secure.

Unless demonstrable prejudice has resulted, the legislative command forbids escape from liability by venue contentions. 28 U. S. C. § 2105 provides:

> "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

The words "matters in abatement" were substituted for the words "plea in abatement" which appeared in the predecessor statute. Reviser's Notes. "Section 2105 relates * * * to the modern equivalent of a common law plea in abatement which was made in the trial court before issue was joined on the merits of the case," Mr. Justice Frankfurter dissenting in *Snyder* v. *Buck*, 340 U. S. 15, 32 (1950). At common law an objection to venue was a plea in abatement. Bouvier's Law Dictionary, p. 14, citing Gould, *Principles of Pleading* (1899) c. V, s. 277; *McLendon* v. *Lurton-Hardaker Co.*, 83 Fla. 263, 266 (1922); *Bishop* v. *Camp & Griffin*, 39 Fla. 517, 519 (1897); *Malessa* v. *Pennsylvania R. Co.*, 22 Pa. Dist. 1087, 1092-1093 (1913); *Hamilton* v. *Dewey*, 22 Ill. 490 (1922).[4]

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[3] 28 U. S. C. § 1406(a) allows dismissal as an alternative to transfer, but transfer is the power generally exercised.

[4] The word "jurisdiction" in the phrase "which do not involve jurisdiction" means jurisdiction of the subject matter, *Hinds* v. *Keith*, 57 Fed. 10, 13 (5th Cir. 1893), or the absence of a necessary party, *Snyder* v. *Buck*, 340 U. S. 15 (1950)—matters which cannot be waived.

POINT IV.

THE VENUE WAS PROPERLY LAID IN THE SOUTHERN DISTRICT OF NEW YORK.

Under Section 27 of the Securities Exchange Act, 15 U. S. C. § 78aa, a criminal proceeding may be brought in any district "wherein any act or transaction constituting the violation occurred." A civil action "to enforce any liability or duty created by this chapter" may be brought in any such district, i.e., a district "wherein any act or transaction constituting the violation occurred." It may also be brought "in the district wherein the defendant is found or is an inhabitant or transacts business * * *."

A.

An Act or Transaction Constituting the Violation Occurred in New York.

1. The petitioner's first argument is that the word "violation" in Section 27 is limited to criminal violations and that there can be no act or transaction constituting such a violation of the statute in the present case, because Section 16(b) does not create any criminal liability.

On its face it appears that the statute does not use the word "violation" with the restricted meaning that petitioner attributes to it. The statute, for example, specifically refers to a suit "* * * to enjoin any violation of such chapter."

The petitioner would have the courts read into Section 27 a distinction that Congress did not make between some types of civil actions and others. On the petitioner's argument, it would appear that where civil accountability could also be criminally punished, the venue provisions would be more inclusive than where civil accountability did not have possible criminal consequences. The construction urged by petitioner would also attribute to Congress the implausible design of

making criminal acts triable in more districts than purely civil acts. In short, the petitioner seeks to persuade the Court that Congress intended to ignore traditions, firmly established since the Sixth Amendment, which make criminal venue narrower in scope than civil venue.

The Court of Appeals, District Courts and a state court have considered and rejected the same venue argument. R. 83-84; *Grossman* v. *Young,* 70 F. Supp. 970, 971-2 (S. D. N. Y., 1947); *Osborne* v. *Mallory,* 86 F. Supp. 869, 879 (S. D. N. Y., 1949); *American Distilling Co.* v. *Brown,* 184 Misc. 431, 434, aff'd 269 App. Div. 763 (1st Dept., 1945), aff'd 295 N. Y. 36 (1945).

The commentators on Section 16(b) have uniformly viewed the district where sales and purchases occurred as the proper venue for suit. Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16(b) of the Securities Exchange Act,* 38 Mich. L. Rev. 133, 153 (1939); Rubin and Feldman, *Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders,* 96 U. Pa. L. Rev. 468, 477-479 (1947); 60 Harv. L. Rev. 1173 (1947).

An independent examination of the legislative history supports the conclusion of these commentators. In the original draft, the bill provided for venue in criminal cases in the locale of acts and transactions but also provided specifically for venue "in the district wherein the exchange involved is operated." As in the present statute, these venue provisions in criminal cases were incorporated by reference as to civil actions by the use of the words "such district." The draft read:

> "Any such criminal proceedings may be brought either in the district wherein the exchange involved is operated, or in the district wherein a transaction violating such provision was consummated, or in the district wherein an act or agreement to act constituting such violation was effected. Any such civil suit or action may be brought in any such district or

in the district where the defendant is found or is an inhabitant or transacts business * * *."

Sen. Rep. 2693, § 25(a), 78 Cong. Rec. 2269-2270 (1934).[5]

Thus, in its original form, the statute indicated that whatever other district might qualify under the general description of the place where a "transaction was consummated" or "where an act or agreement to act * * * was effected" the district where the exchange is operated on which the purchase and sale is made should be a proper venue of a civil as well as criminal case.

The bills as reported out of the Senate and House Committees contain the venue provisions in their present form. No comment was made by either Committee on the change. Sen. Rep. 792, 73rd Cong. 2nd Sess. (1934); H. R. Rep. 1383, 73rd Cong. 2nd Sess. (1934) [reprinted in 78 Cong. Rec. 7701 (1934)]. What the Committee did was to shear Section 27 of all qualifying and limitary language. The result broadened the scope of the statute and our inference is that the omission was an extension not a limitation of jurisdiction.

Section 27 of the Securities Exchange Act was incorporated into subsequent statutes. Public Utility Holding Company Act of 1935, 15 U. S. C. § 79(y); Investment Company Act, 15 U. S. C. § 80-a-43; Investment Advisers Act, 15 U. S. C. § 80-b-14; Federal Power Act, 16 U. S. C. § 825p. This use demonstrates the Congressional intent to add the *locus* of the act as an alternative to the traditional forum of the defendant's residence, where facilities of interstate commerce are involved.

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[5] This provision was said by Senator Fletcher, who introduced the bill, to be "similar to those in the National Securities Acts * * *." 78 Cong. Rec. 2272 (1934). Mr. Corcoran in the Hearings before the Senate Committee on Banking and Commerce on Sen. Res. 84, etc., 73rd Cong., 1st Sess., p. 6577 (1934), stated: "These provisions have been taken practically verbatim out of the Securities Act and are merely provisions for the jurisdiction of the courts for violation of the act." The prototype in the Securities Act of 1933 for the venue provision being considered has been construed to include the place where the sale occurred. *Cohen* v. *Saddlemire*, 26 F. Supp. 27 (D. C. Mass. 1939).

2. The petitioner's second contention is that he "did nothing in New York that was in violation of Section 16(b)." As Judge Learned Hand stated, this argument "rests upon the assumption that the wrong consists in failing to turn over the profits to the corporation. In fact it is obtaining the profits by the wrongful purchase and sale, or sale and purchase, of shares; and those acts took place on the floors of the New York Exchanges where by his orders the transactions took place" (R. 84).

B.

The Petitioner-Defendant Transacted the Business in New York.

Under Section 27, venue may be laid in the district "wherein the defendant * * * transacts business * * *." On this ground too the venue was correct.

It is well established that the extensive trading in securities constitutes engaging in trade or business. *Commissioner* v. *Nubar,* 185 F. 2d 584 (4th Cir., 1950); *Fuld* v. *Commissioner,* 139 F. 2d 465, 468-469 (2nd Cir., 1943). If an active speculator is "engaged in trade or business," certainly he is also transacting business.

To be sure, the concept of "transacting business" is generally applied to corporations when issues of venue are involved. The reason that it is not more often applied to individuals is that the state courts, in such circumstances, cannot secure personal service over an out-of-state individual who transacts business within the state. Cf. *Flexner* v. *Farson,* 248 U. S. 289 (1919). But Congress has provided in Section 27 that a defendant may be served in any district that he is found, *Kardon* v. *National Gypsum Co.,* 73 F. Supp. 798, 800 (E. D. Pa., 1947); *Stella* v. *Kaiser,* 82 F. Supp. 301, 303 (S. D. N. Y., 1948), so that the difficulty which ordinarily confronts the state courts does not exist.

CONCLUSION.

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT AND NO QUESTIONS ARE PRESENTED WHICH CALL FOR THE EXERCISE BY THIS COURT OF ITS SUPERVISORY POWERS BY WRIT OF CERTIORARI.

Respectfully submitted,

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April 10, 1951.

APPENDIX.

STATUTES INVOLVED

Securities Exchange Act of 1934, Section 16(b), 15 U. S. C. § 78p(b).

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

Securities Exchange Act of 1934, Section 27, 15 U. S. C. § 78aa.

The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in Sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

28 U. S. C. § 1406(a).

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U. S. C. § 2105.

There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.